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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S. p. A.,
PETITIONER,

vs.

JOHN LISI, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERTIORARI GRANTED NOVEMBER 6, 1967

PETITION FOR CERTIORARI FILED MARCH 20, 1967

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Summary of Proceedings in District Court from Docket Entries

Since this is an Interlocutory Appeal, only those docket entries in the District Court which are material to the Appeal are set forth below.

—B—

Date	Proceedings
November 7, 1960	— Filed Complaint and issued Summons in Lisi action.
December 22, 1960	— Filed Answer of defendant Alitalia-Linee Aeree Italiane, S.p.A. in Lisi action.

—F—

September 29, 1961	— Filed Complaint and issued Summons in Maiorano action.
October 26, 1961	— Filed Answer to Complaint by defendant Alitalia-Linee Aeree Italiane, S.p.A. in Maiorano action.

—H—

June 12, 1963	— Filed record of proceedings transferred from District Court for the Eastern District of New York and photostatic copy of its Docket Sheet in Como, DiBiase and Cologgi actions.
October 14, 1965	— Filed plaintiffs' Affidavit of Notice of Motion for Summary Judgment.
October 14, 1965	— Filed plaintiffs' brief.
February 23, 1966	— Filed defendant's Statement under General Rule 9(g).

Summary of Proceedings in District Court from Docket Entries

[2a]*

Date	Proceedings
	—H—**
April 1, 1966	— Filed Affidavit of George N. Tompkins, Jr. in opposition to plaintiffs' motion for summary judgment.
April 1, 1966	— Filed defendant's memorandum in opposition to plaintiffs' motion for summary judgment.
April 1, 1966	— Filed defendant's supplemental memorandum of law.
April 1, 1966	— Filed defendant's memorandum of law.
April 1, 1966	— Filed Affidavit of Theodore E. Wolcott in support of plaintiffs' motion for summary judgment.
April 1, 1966	— Filed plaintiffs' reply memorandum.
April 1, 1966	— Filed Affidavit of Nicolas Disclafani in support of plaintiffs' motion for summary judgment.
April 1, 1966	— Filed Affidavit of Theodore E. Wolcott in support of plaintiffs' motion for summary judgment.
	—I—

* Figures in bold brackets [ ] refer to pages of Appendix in Circuit Court of Appeal.

** Figures with dashes — — refer to pages of original record on file in District Court.

Summary of Proceedings in District Court from Docket Entries

Date	Proceedings
April 1, 1966	— Filed Opinion No. 32,200, per MacMahon, D. J. — Plaintiffs' motion for partial summary judgment dismissing defendant's affirmative defenses is granted — trial stayed pending Appeal. [3a]
April 15, 1966	— Filed Defendant's Notice of Appeal — mailed copy to Theodore E. Wolcott, Esq.
May 24, 1966	— Filed Stipulation — original papers indicated shall constitute the Record on Appeal.

[4a]
—14—

Answer of Defendant
Alitalia—Linee Aeree Italiane, S.p.A.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

* * * * * *

—23—

* * * * * *

As and for a First Separate and Complete Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

52. Alleges that the transportation by air during the course of which the subject matter of these causes of action arose was being performed pursuant to a contract made by Defendant ALITALIA with each of Plaintiffs' decedents, Luigina Zocci Lisi and John Lisi, Jr., providing for international transportation within the meaning of and subject to the provisions of the Convention For The Unification Of Certain Rules Relating To International Transportation By Air and Additional Protocol, signed at Warsaw on October 12, 1929 (otherwise known as, and hereinafter referred to as, the "Warsaw Convention"); that Defendant ALITALIA duly complied with and performed all of the conditions and requirements of said Warsaw Convention; and that the rights of the parties herein are governed by said contracts of transportation and by the provisions of the said Warsaw Convention.

—24—

53. Alleges that Article 20 (1) of the said Warsaw Convention provides as follows:

[5a]

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

54. Alleges that Defendant ALITALIA and its agents took all necessary measures to avoid the damage alleged in the Complaint, and Defendant ALITALIA is therefore not liable to plaintiff.

As and for a Second Separate and Complete Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

55. Repeats, reiterates and realleges each and every allegation contained in paragraphs 52. and 53. of this Answer with the same force and effect as if herein set forth in full.

56. Alleges that it was impossible for Defendant ALITALIA or its agents to take all necessary measures to avoid the damage alleged in the Complaint and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Third Separate and Partial Defense to the First, Second, Third, Fourth and Fifth Causes of Action Alleged in the Complaint

57. Repeats, reiterates and realleges each and every allegation contained in paragraph 52. of this Answer with

—25—

the same force and effect as if herein set forth in full.

58. Alleges that Article 22 of the said Warsaw Convention provides as follows:

[6a]

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

"(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

"(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

—26—

59. Alleges that Defendant ALITALIA did not agree by special contract, or by any contract, that plaintiff's dece-

dents Luigina Zocci Lisi and John Lisi, Jr., should be entitled to any higher limit of liability than hereinabove set forth in paragraph 58. of this Answer, and the liability, if any, of Defendant ALITALIA with respect to each of said decedents is therefore limited as follows: [7a]

a) with respect to the transportation of decedent Luigina Zocci Lisi—to the sum of $8,291.87;

b) with respect to the transportation of any checked baggage of decedent Luigina Zocci Lisi—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

c) with respect to any objects of which decedent Luigina Zocci Lisi took charge herself—to the sum of $331.67;

d) with respect to the transportation of decedent John Lisi, Jr.—to the sum of $8,291.87;

e) with respect to the transportation of any checked baggage of decedent John Lisi, Jr.—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

f) with respect to any objects of which decedent John Lisi, Jr. took charge himself—to the sum of $331.67.

As and for a First Separate and Complete Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

60. Alleges that the transportation by air during the course of which the subject matter of these causes of action

[8a]

arose was being performed pursuant to a contract made by Defendant ALITALIA and Frank Lisi providing for international transportation within the meaning of and subject to the provisions of the Convention For The Unification of Certain Rules Relating to International Transportation By Air and Additional Protocol, signed at Warsaw on October 12, 1929 (otherwise known as, and hereinafter referred to as, the "Warsaw Convention"); that Defendant ALITALIA duly complied with and performed all of the conditions and requirements of said Warsaw Convention; and that the rights of the parties herein are governed by said contract of transportation and by the provisions of the said Warsaw Convention.

61. Repeats, reiterates and realleges each and every allegation contained in paragraph 53. of this Answer with the same force and effect as if herein set forth in full.

—28—

62. Alleges that Defendant ALITALIA and its agents took all necessary measures to avoid the damages alleged in the Complaint, and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Second Separate and Complete Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

63. Repeats, reiterates and realleges each and every allegation contained in paragraphs 60. and 53. of this Answer with the same force and effect as if herein set forth in full.

[9a]

64. Alleges that it was impossible for Defendant ALITALIA or its agents to take all necessary measures to avoid

the damage alleged in the Complaint and Defendant ALITALIA is therefore not liable to Plaintiff.

As and for a Third Separate and Partial Defense to the Sixth, Seventh and Eighth Causes of Action Alleged in the Complaint

65. Repeats, reiterates and realleges each and every allegation contained in paragraphs 60. and 58. of this Answer with the same force and effect as if herein set forth in full.

66. Alleges that Defendant ALITALIA did not agree by special contract, or by any contract, that Frank Lisi should be entitled to any higher limit of liability than hereinabove

set forth in paragraph 58. of this Answer, as realleged in paragraph 63. of this Answer, and the liability, if any, of Defendant ALITALIA to plaintiff is therefore limited as follows:

a) with respect to the transportation of Frank Lisi—to the sum of $8,291.87;

b) with respect to the transportation of any checked baggage of Frank Lisi—to the sum of $16.58 per kilogram of weight of any such checked baggage; and

c) with respect to any objects of which Frank Lisi took charge himself—to the sum of $331.67.

• • • • •

[10a]
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Motion Under Rules 56 and 12

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

And Related Cases Index Nos. 63 Civ. 1735, 63 Civ. 1736, 61 Civ. 641, 60 Civ. 4365

SIRS:

PLEASE TAKE NOTICE that pursuant to Rules 56 and 12 of the Federal Rules of Civil Procedure, and upon the annexed affidavit of Theodore E. Wolcott, sworn to October 12, 1965, and the exhibits attached thereto, and upon the pleadings and proceedings heretofore filed and had herein, the plaintiffs will move this Court, at the Chambers of the Honorable Lloyd F. MacMahon, U. S. D. J., at the Courthouse, Foley Square, City and State of New York, on the 28th day of October, 1965 at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting partial summary judgment, dismissing the first, second and third affirmative defenses interposed by the defendant Alitalia, and generally dismissing the defenses that the instant and the related actions are subject to the limitations of liability

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provided under the Warsaw Convention, and for such other and further relief as to the Court may seem just and proper in the premises.

Answering affidavits are demanded five days before the return date.

Motion Under Rules 56 and 12

Dated: New York, N. Y., October 12, 1965 [11a]

Yours, etc.,

THEODORE E. WOLCOTT
Attorney for Plaintiffs
36 West 44th Street
New York, N. Y. 10036

To:

CONDON & FORSYTH
Attorneys for Defendant
1 Rockefeller Plaza
New York, N. Y. 10020

[12a]
—129—

Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs herein, and am fully familiar with the facts herein, and make this affidavit in support of the attached application for partial summary judgment dismissing the defenses of the Warsaw Convention, pursuant to which the defendant, an Italian flag air carrier, seeks to limit its liability for the wrongful deaths and serious injuries of the plaintiff's decedents or personal injury plaintiffs who were passengers on a Douglas DC-7C aircraft owned, operated and controlled by the defendant Alitalia.

The aircraft crashed within minutes of a night takeoff from Shannon Airport, Ireland, in the early hours of Feb-

—130—

ruary 26, 1960. The plane was headed west-bound over the North Atlantic for New York. The plaintiff Como brings this action on behalf of the Disclafani family, who were passengers on this airplane. They consist of the mother, a widow, Mrs. Caterina Disclafani, and her minor children, Giuseppe, Alfredo, Maria and Nicolas. The

[13a]

mother, Caterina, and the child, Alfredo, were killed in the accident, and the surviving children suffered serious personal injuries.

The aircraft involved in the flight herein took off from Rome, Italy, and made a technical stop at Shannon Airport for the purpose of refueling. The journey of the Disclafani family was from Tunis to New York, on the lines of Alitalia, as provided by the tickets issued by Alitalia at Tunis. The date and place of the issuance of the tickets is shown by a stamp on the upper right-hand corner of the face of the tickets. The photocopies of the tickets on the ticket stock of Alitalia are attached hereto as Exhibit A. An examination of the microscopic print on this ticket reveals that it is written in Italian, and to some extent, in English.

I

The Disclafani's transportation from Tunis to New York was not subject to the Warsaw Convention, since Tunisia at the time of the accident on February 25-26, 1960, was not a party to the Warsaw Convention. Article 1(2) reads:

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, *according to the contract made by the parties,* the place of departure and the

place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the *territories of two High Contracting Parties,* or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suze-

rainty, mandate or authority of another power, even [14a]
though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention." (Emphasis supplied.)

It is a matter of fact that "Tunisia was not a contracting party to the Warsaw Convention as of February 25-26, 1960." (Letter of U. S. Department of State, July 12, 1965.) In fact, it was not until November 15, 1965 that Tunisia deposited its instrument of adherence to the Warsaw Convention, which became effective on February 13, 1964. (Department of State letter, supra.) A true copy of the letter of the Department of State dated July 12, 1965, establishing the above, is annexed hereto as Exhibit B.

Accordingly, since Tunisia was not a party to the Warsaw Convention at the time of this accident for transportation issued in connection therewith, the limitations of the Warsaw Convention do not apply to the Disclafani claims. It is further averred that long before this accident, and by treaty of March 20, 1965, the full and sovereign independence of Tunisia was declared. A true photocopy of the treaty as set out in the release of the French Embassy dated March, 1956, is annexed hereto as Exhibit C. See also 51 Am. J. of Int. Law 683.

In connection with the above, it is stated, upon information and belief, that it was not until after 1956 that Tunisia

had its own airline, and it was not until November, 1963

that Tunisia decided that it would attempt to secure the liability limiting advantages of the Warsaw Convention for itself. Obviously, it is the concern of the foreign policy [15a] of a country in relation to its own economic interests to determine in the exercise of its sovereignty whether it wishes to adhere to the Warsaw Convention.

II

Even if the Disclafani transportation were Warsaw Convention transportation (which is not conceded), the limitations of the Warsaw Convention do not apply, since the ticket did not comply with the mandatory requirements of the Warsaw Convention. The Convention provides under Chapter II, Transportation Documents, Article 3, in pertinent part as follows:

"(1) For transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: . . .

(e) A statement that the transportation is subject to the rules relating to liability established by the convention.

(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

It is clear that the purpose of the above was to insure that the carrier gave clear notice to the passenger that he was being carried subject to the unusual limitations of

—133—

liability sought to be imposed. If the carrier omitted to

[16a]

give this clear notice, then the limitations of liability would not apply. But this omission or "irregularity", as provided in the first clause, will not otherwise affect the contract of international transportation which remained nevertheless subject to the Convention rules. It may be noted in passing that this is practically the only provision in the Convention that offers some protection to the passenger; the so-called presumptive liability up to $8300 clause being not only ridiculously inadequate, but illusory.

It is respectfully submitted that the ticket which is the only part pertinent here does not make a clear and unequivocal statement that the transportation is subject to the Warsaw Convention Rules of Liability as required.

Although there is nothing in the text of the Warsaw Convention with respect to the language in which the "contract made by the parties" shall be written, it must obviously refer to the official language of the country where the contract (ticket) was issued. The official language of Tunisia, the place where this ticket contract was issued, is Arabic. This well-known fact is further established by the exchange of letters with the Consulate General in New York of Tunisia. True copies of my letter of inquiry dated July 21, 1965 to the Consulate General of Tunisia in New York, and of his reply thereto, are annexed hereto as Exhibits D-1 and D-2 respectively. Since obviously Alitalia relies upon implied rather than actual notice to the

Disclafanis of the applicability of the Warsaw Convention, like any other implied notice or public notice, it must be in the official language of the country where such notice is given.

III

[17a]

With respect to all of the tickets issued to plaintiffs' decedents and to personal injury plaintiffs, such tickets nevertheless failed to comply with the specific mandatory requirements of Article 3 of the Warsaw Convention. At the very bottom of the face of the ticket there is some very light and microscopic print which appears unreadable, and even if it could be read, unclear. A true version of the English language portion is as follows:

> "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention *may be* applicable, and the Convention governs and in *most cases* limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." (Emphasis supplied.)

Even if the passenger were able to read this fine print it is obvious that he still would not know whether his trip was subject to the Warsaw Convention since there is no unequivocal statement to that effect. It "may or may not be applicable and only in some cases." For the passenger to know, he would have to first consult a lawyer highly specialized in the field of international air transportation.

Obviously, from all of the facts and circumstances herein, the passengers did not have adequate notice to afford them a reasonable opportunity to take measures to pro-

tect themselves against limitation of liability" as provided in Article 3. The statement was defective in that it was

—135—

unnoticeable, unreadable, and even if read, it did not clearly and unequivocally state it was subject to the rules of limitation of liability of the Warsaw Convention.

[18a]

CONCLUSION

The Court is respectfully asked to take judicial notice of the fact that the public policy of the State of New York and generally of the Congress of the United States is against limitation of liability for acts of negligence, not only for personal injury, but for wrongful death. The Court's attention is also respectfully called to the fact that not only has disapproval of the unjust, unfair and grossly inadequate limitations of liability been widely expressed by much of the judiciary and the press, but that recent indications from the State Department and the Senate Foreign Relations Committee as reported in the press are to the effect that this country may soon denounce the Warsaw Convention.

It is respectfully submitted that no issues of fact are present as to the subject matter of this motion for partial summary judgment, and that the application herein should be granted.

THEODORE E. WOLCOTT

(Sworn to October 12, 1965.)

[19a]
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Affidavit of Charles R. Angst

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

CHARLES R. ANGST, being duly sworn, deposes and says:

1. I am Traffic Manager, U.S.A., for Alitalia, defendant herein.

2. When the subject accident occurred, it was my responsibility to obtain all flight coupons which were used by all passengers on the subject flight. I obtained these flight coupons from our Rome offices. I submit with this affidavit all those flight coupons used by plaintiffs in this accident on the subject flight, with the exception of the *Cologgi* plaintiffs. These passengers were travelling on a passenger ticket issued by Transworld Airlines, Inc. I did obtain photocopies of the flight coupons used by the *Cologgi* passengers on the subject flight and they are submitted herewith.

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3. Also submitted herewith are complete forms of the complete passenger tickets identical to those issued to and used by the passengers on this flight. When all flight coupons have been used by the passenger, the remaining portion of the passenger ticket represented by the booklet

[20a]

is retained by the passenger. The carrier only receives and retains those flight coupons used out of each ticket.

4. I am unable to submit a form of the TWA ticket used by the *Cologgi* passengers. Nevertheless, both the Alitalia form of ticket and the TWA form of ticket are identical in their references to the Warsaw Convention.

5. Both Alitalia and TWA are members of the International Air Transport Association and, as such, are required to use the same form of ticket. At the time of the accident herein and at the time of the issuance of these tickets, the form of tickets used by both Alitalia and TWA were standard IATA tickets and contained the same statements as to the applicability of the Warsaw Convention.

6. The flight coupons used by these passengers are submitted herewith in an envelope marked Exhibit "A". The forms of complete tickets are submitted herewith in an envelope marked Exhibit "B".

CHARLES R. ANGST

(Sworn to October 27, 1965.)

[21a]

Exhibit A Annexed to Affidavit of Charles R. Angst

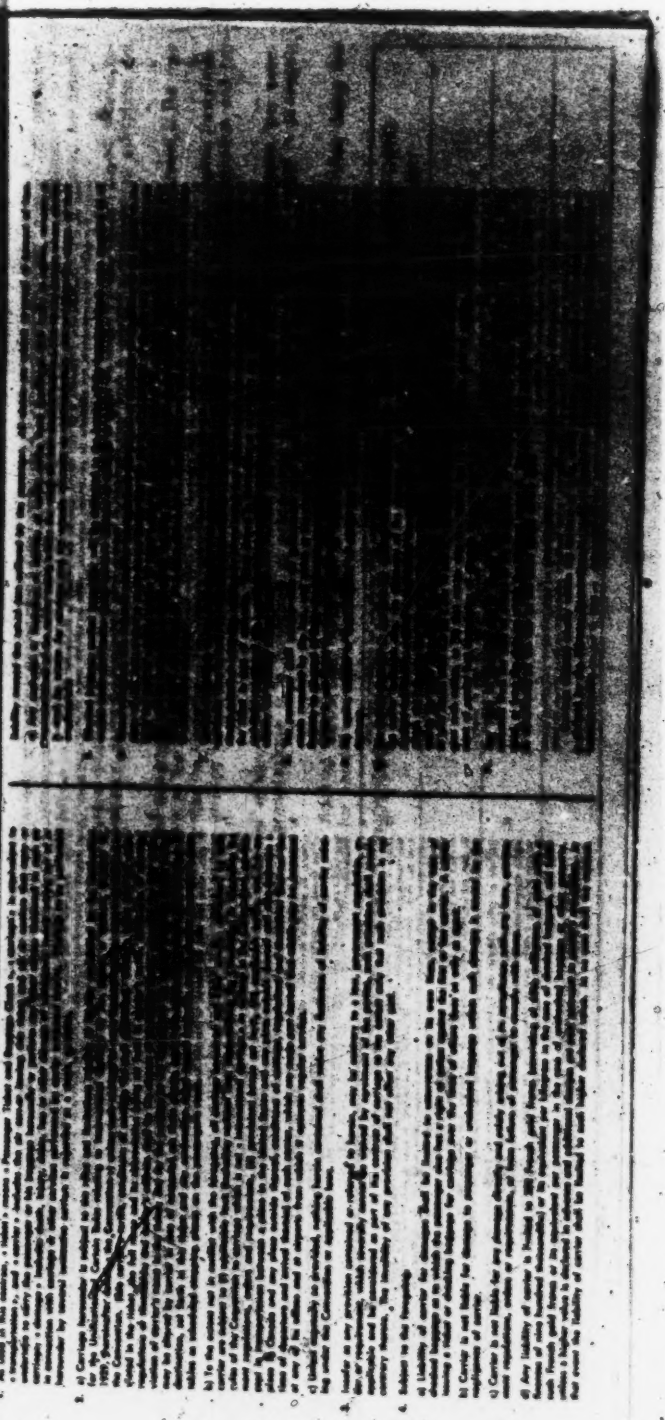
(See Opposite) ☞

[22a]

[23a]

Exhibit A Annexed to Affidavit of Charles R. Angst

(See Opposite) ☞



[25a]

Exhibit A Annexed to Affidavit of Charles R. Angst

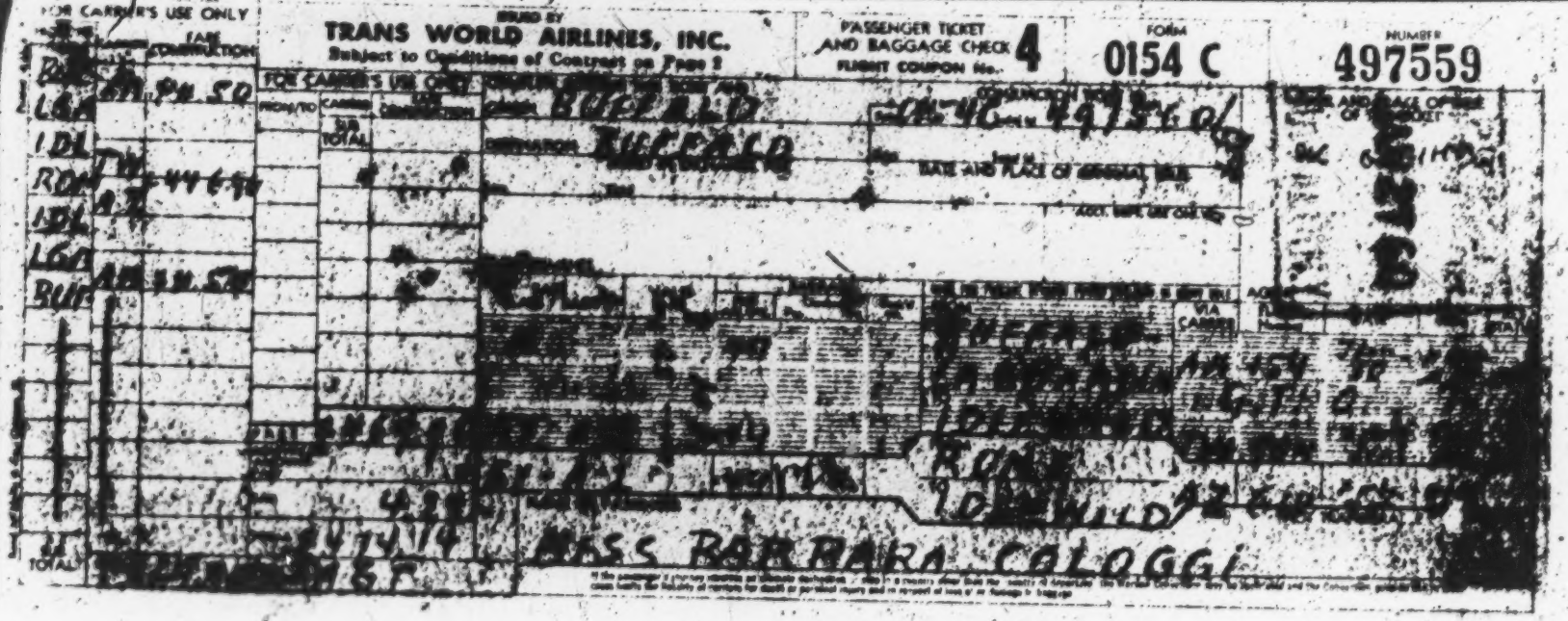
(See Opposite) ☞

2
ROCHELLE
1952
Nº 2122677

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154-C—
No. 497559 issued to Miss Barbara Cologgi

(See Opposite) ☞


FOR CARRIER'S USE ONLY

ISSUED BY

TRANS WORLD AIRLINES, INC.

Subject to Conditions of Contract on Page 2

PASSENGER TICKET AND BAGGAGE CHECK 4

FORM 0154 C

NUMBER 497559

MISS BARBARA COLOGGI

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154 C—
No. 497557 issued to Mrs. Rose Cologgi

(See Opposite) ☞

Exhibit A Annexed to Affidavit of Charles R. Angst

Trans World Airlines, Inc. Ticket, Form 0154 C—
No. 497555 issued to Mr. Rocco Cologgi

(See Opposite) ☞

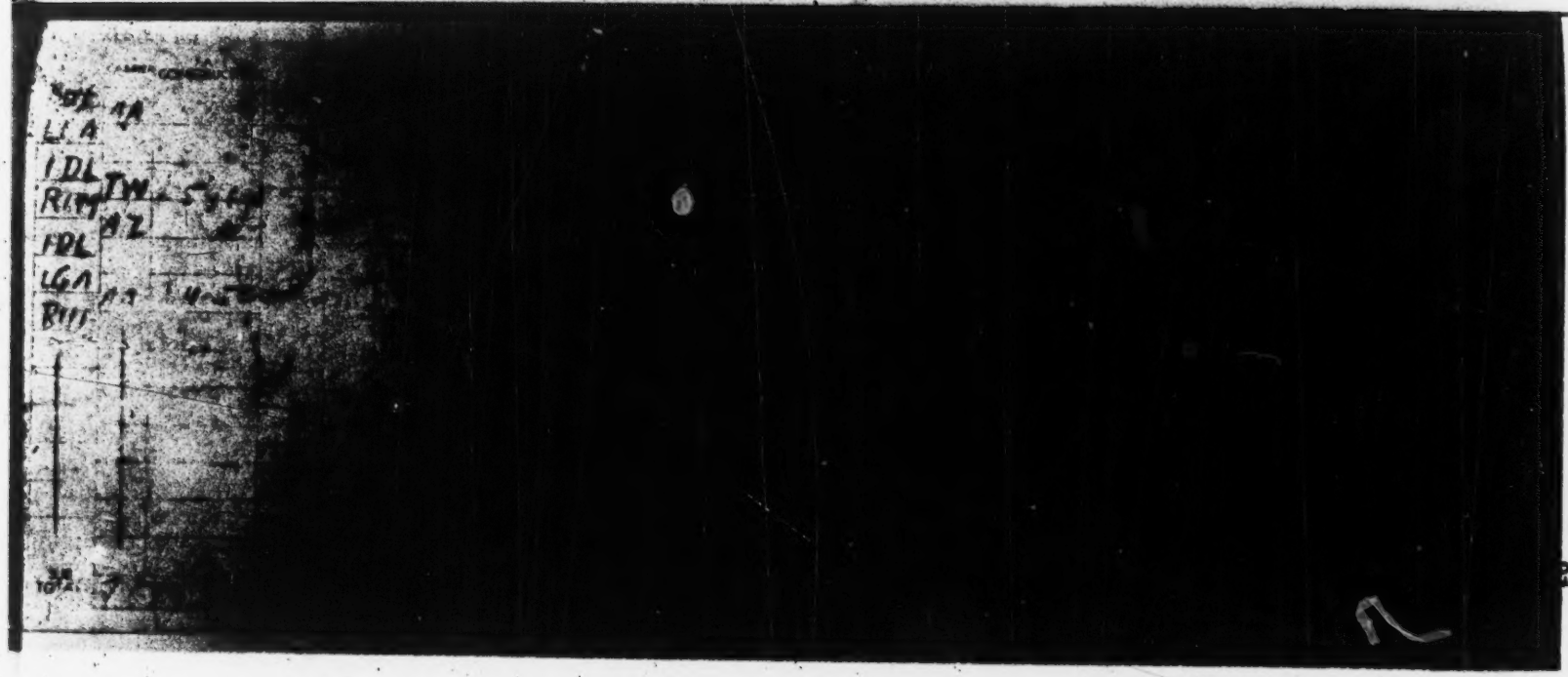

LEA
IDL
RIM
IDL
LGA
BIII

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135790 issued to Inf. Lisi

(See Opposite) ☞

ALITALIA
LINEE AEREE ITALIANE
1135790

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135788 issued to Mrs. Zocci L. Lisi

(See Opposite) ☞

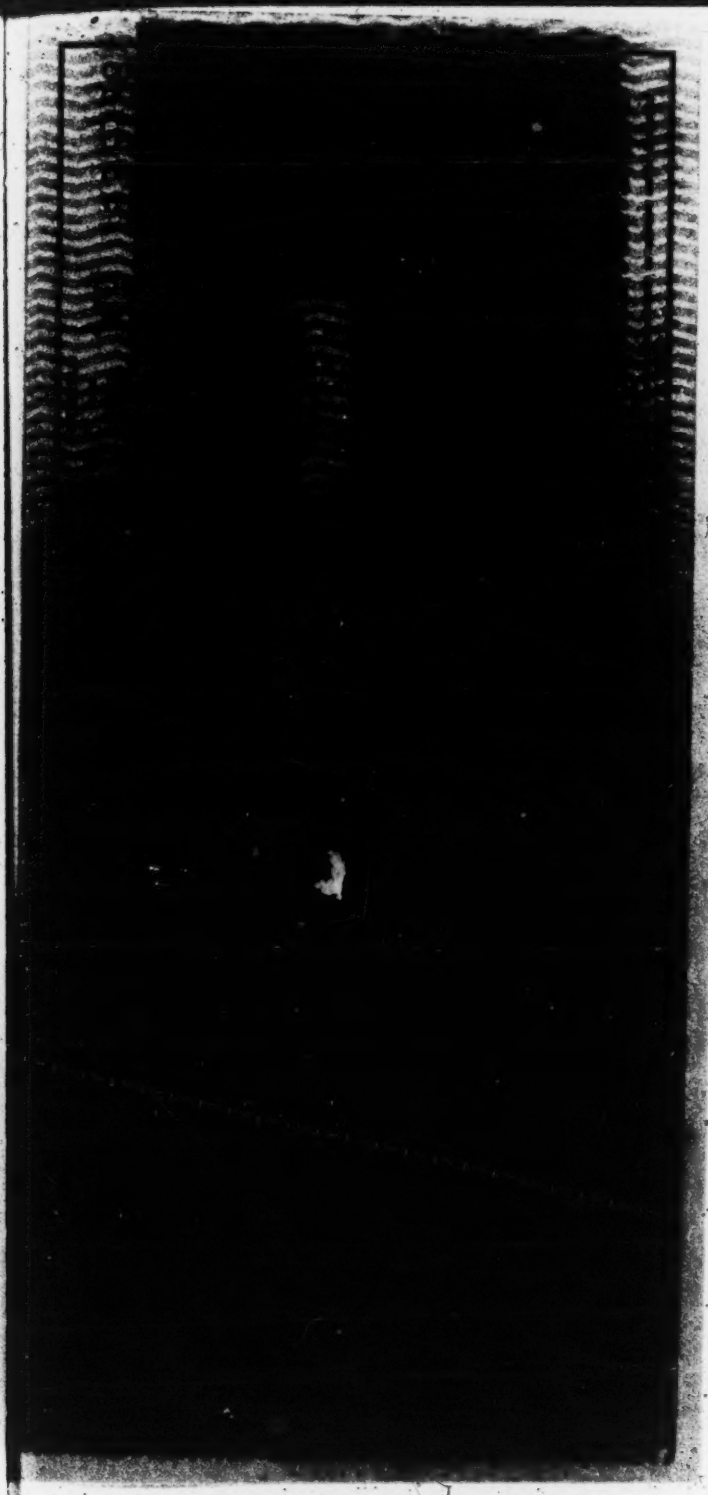


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122676 issued to Mrs. Caterina Di Sclafani

(See Opposite) ☞

EMESSO DA
Issued by

ALITALIA

LINEE AEREE ITALIANE

BIGLIETTO PASSEGGERI
E CONTROLLO BAGAGLIO
Passenger Ticket and Baggage Check

TAGLIANDO DI VOLO N. **2**

MODELLO
Form
552

Nº 2122676

DATA E LUOGO DI EMISSIONE DEL BIGLIETTO
Date and place of issue of this ticket

22 FEB 66

AZ	618	25/2	20		OK	

RICONFERMARE DA:
Reconfirm to:

VIAGGIO AZ Tunis DATA 24/2/66

Ogni esemplare

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122677 issued to Mr. Alfredo Di Sclafani

(See Opposite) ☞

BIGLIETTO PASSEGGERI
E
CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

EMESSO DA
issued by

ALITALIA

CANCELLED

247050

AEROLINEE ITALIANE INTERNAZIONALI

I.A.T.A. Member

Via Leonida Bissolati, 20 - R[illegible]

1

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni riportate a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 1135789 issued to C. M. Lisi

(See Opposite) ☞

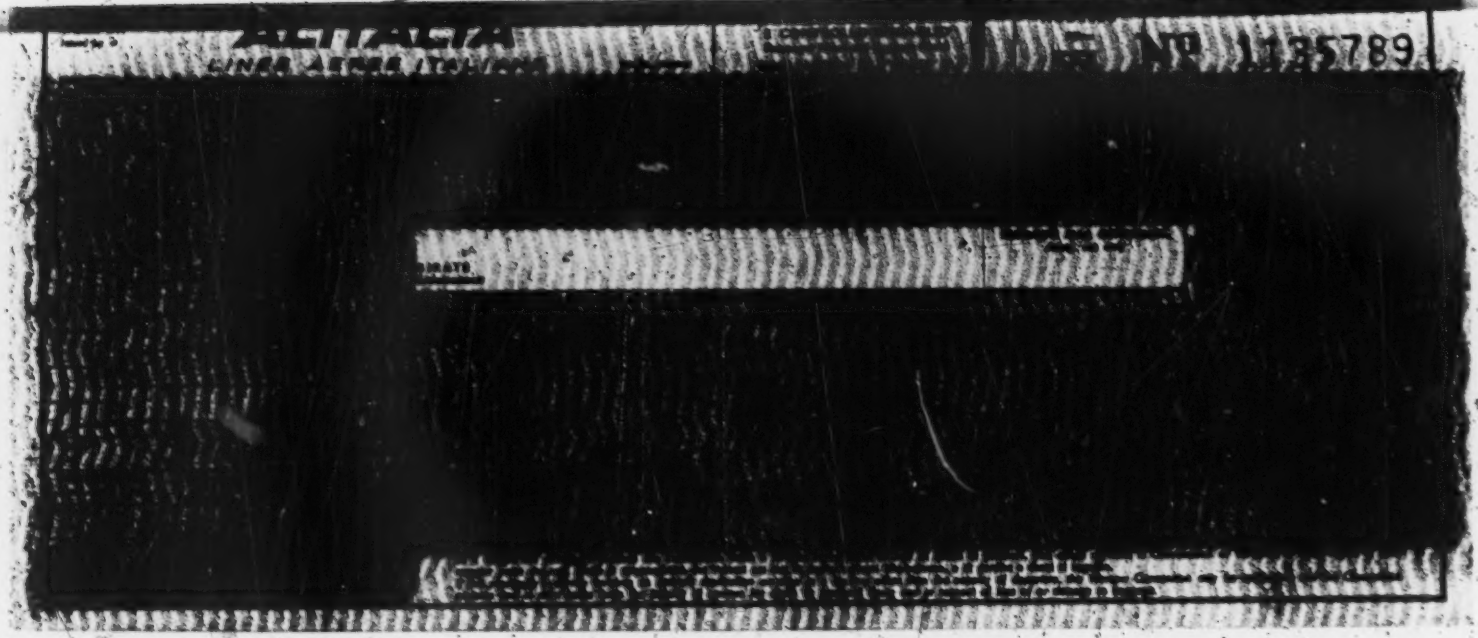


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122678 issued to Miss Maria Di Sclafani

(See Opposite) ☞

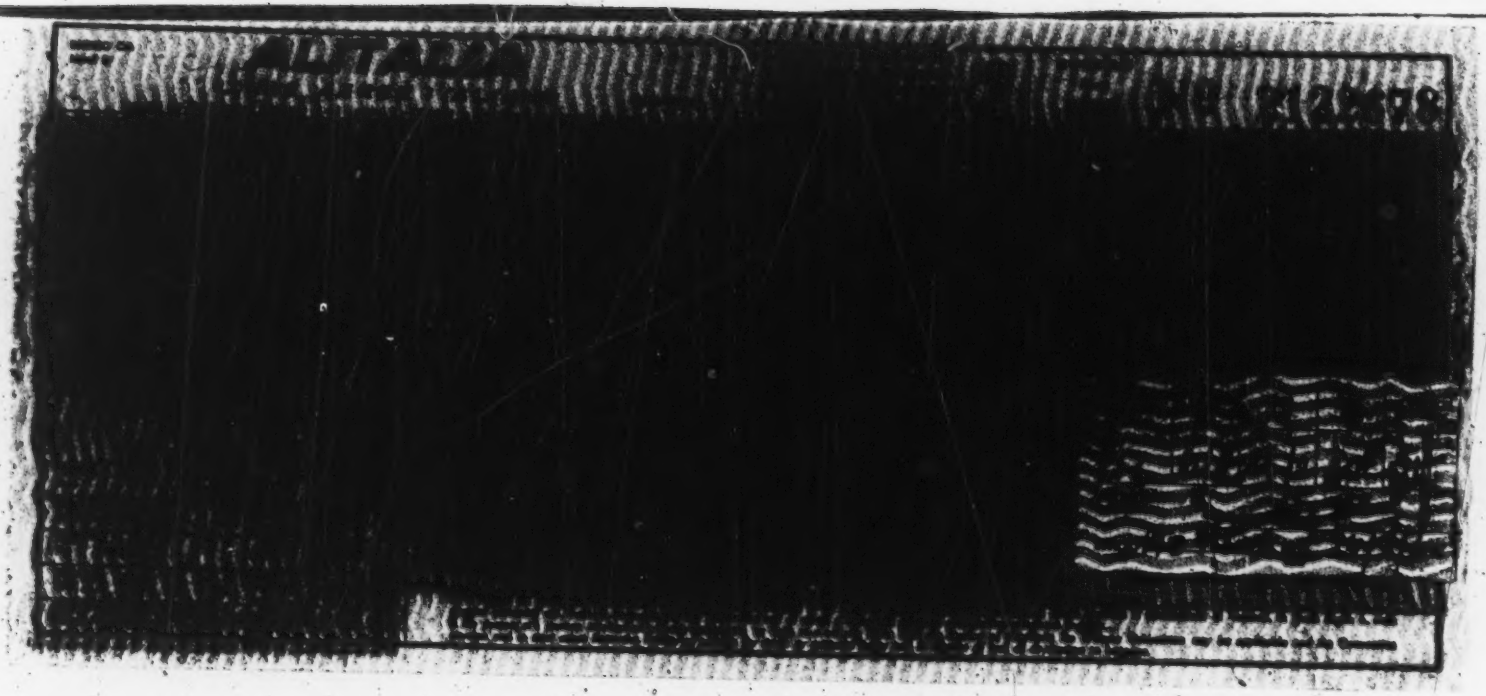


Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 551—
No. 11035229 issued to Mr. Joseph

(See Opposite) ☞

Nº 1035229

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 554—
No. 4077934 issued to Mrs. Farina Notte Angela Teresa

(See Opposite) ☞

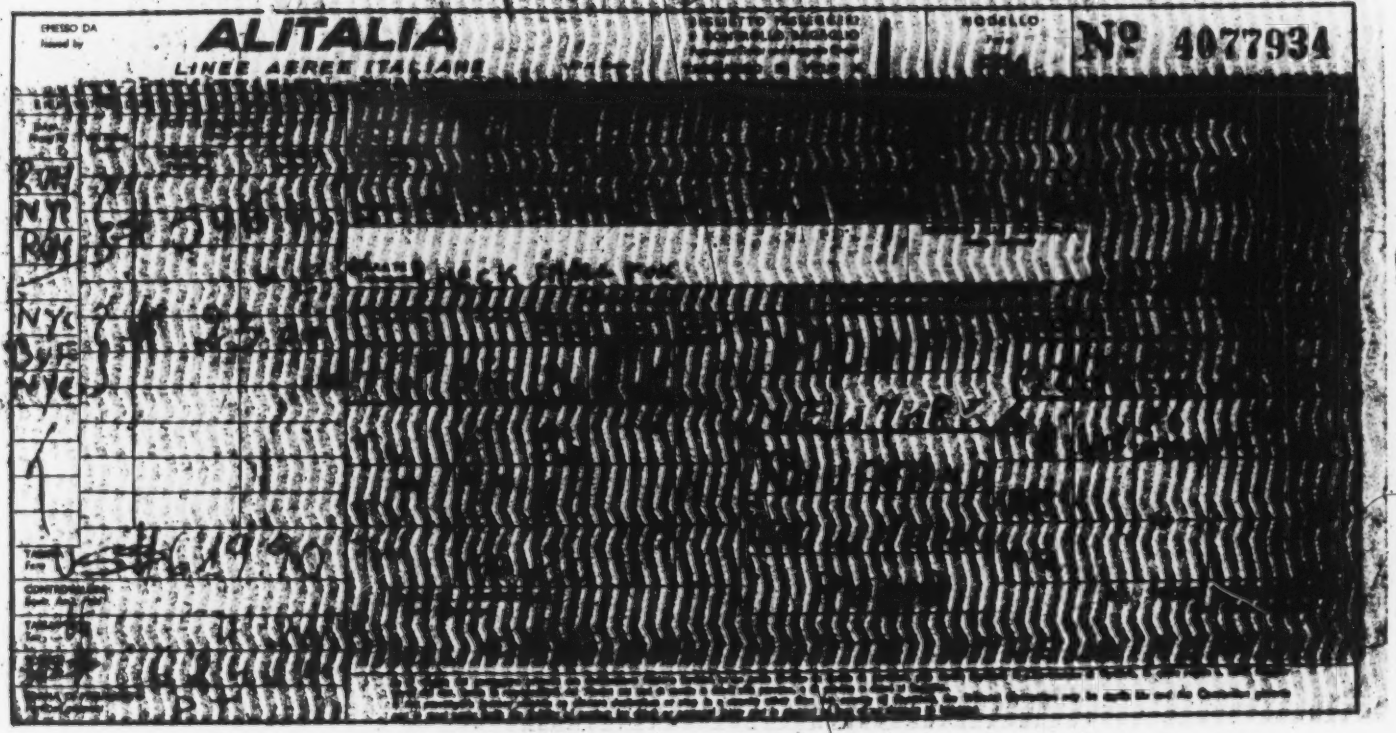

ALITALIA
LINEE AEREE ITALIANE
Nº 4077934

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122679 issued to Chd. Guiseppe Di Sclafani

(See Opposite) ☞

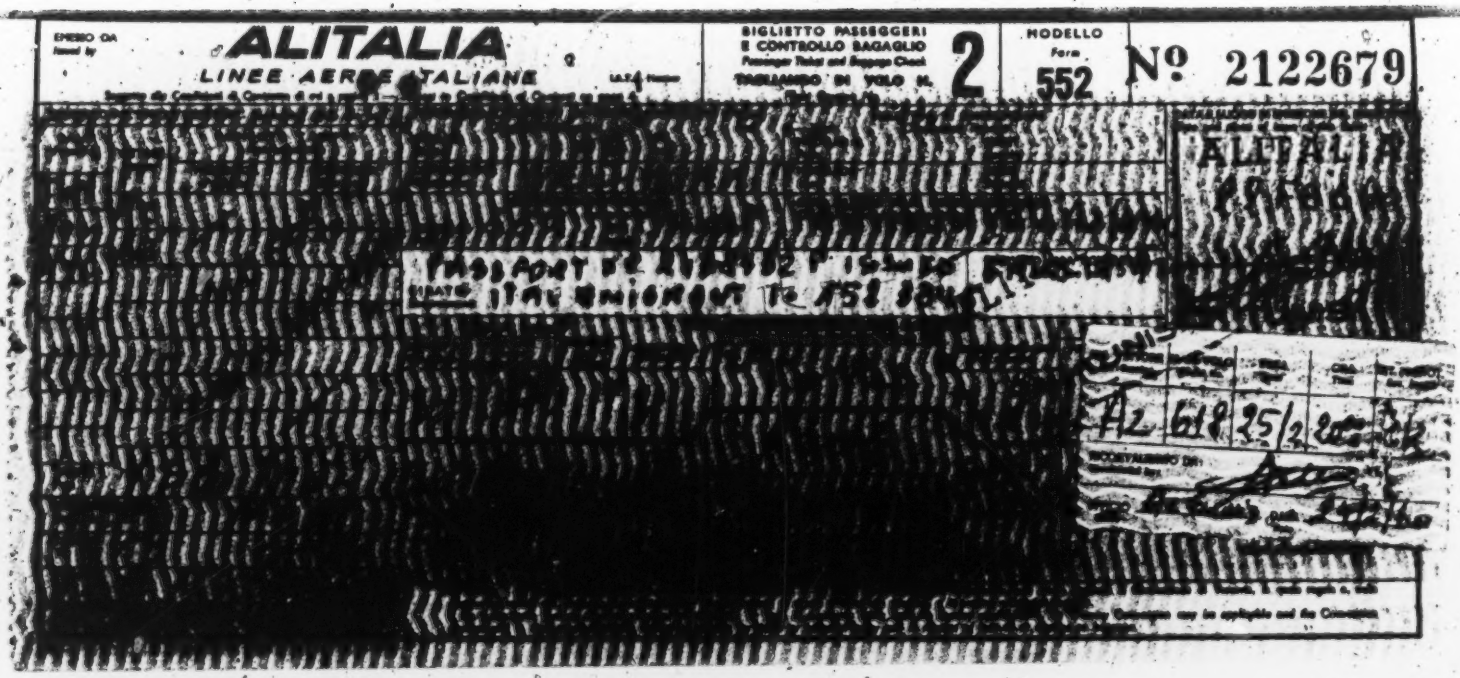

ALITALIA
LINEE AEREE ITALIANE
BIGLIETTO PASSEGGERI
E CONTROLLO BAGAGLIO
2
MODELLO
552
Nº 2122679
ALITALIA

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Ticket, Form 552—
No. 2122675 issued to Mr. Nicola Di Sclafani

(See Opposite) ☞

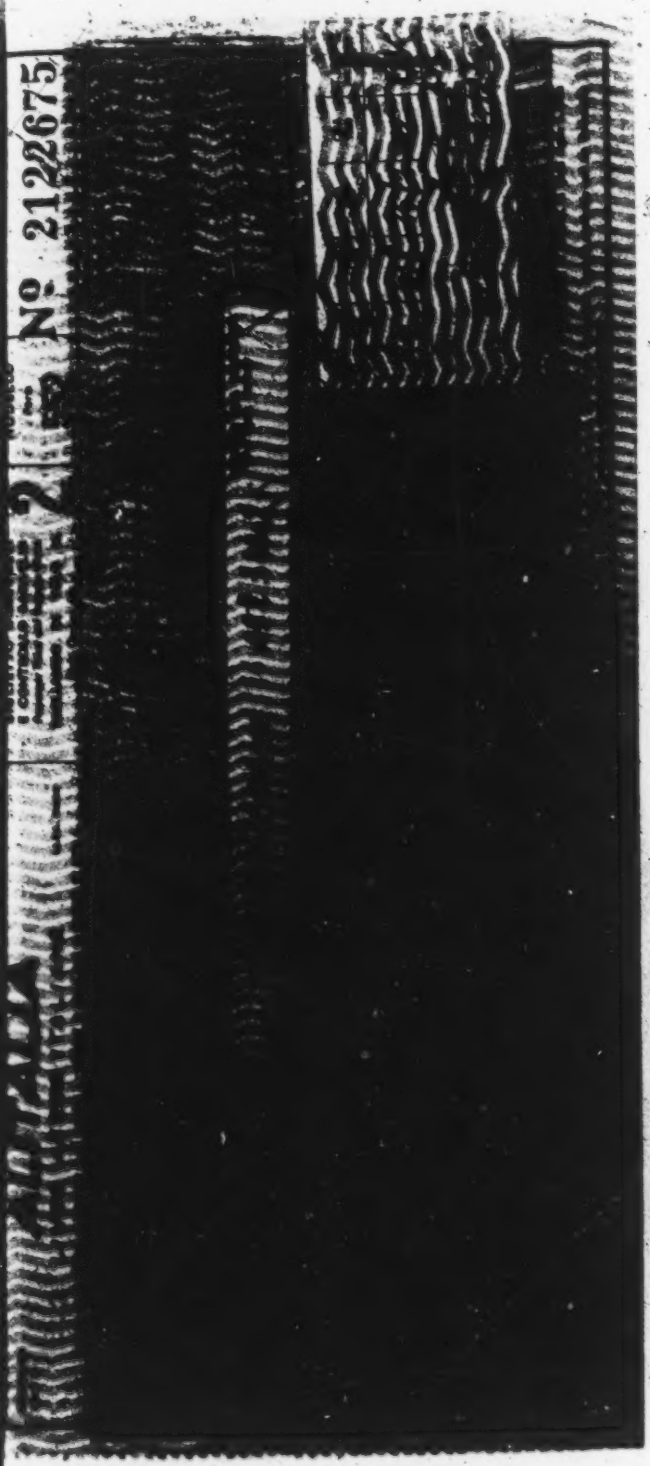

Nº 2122675

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 551

(See Opposite) ☞

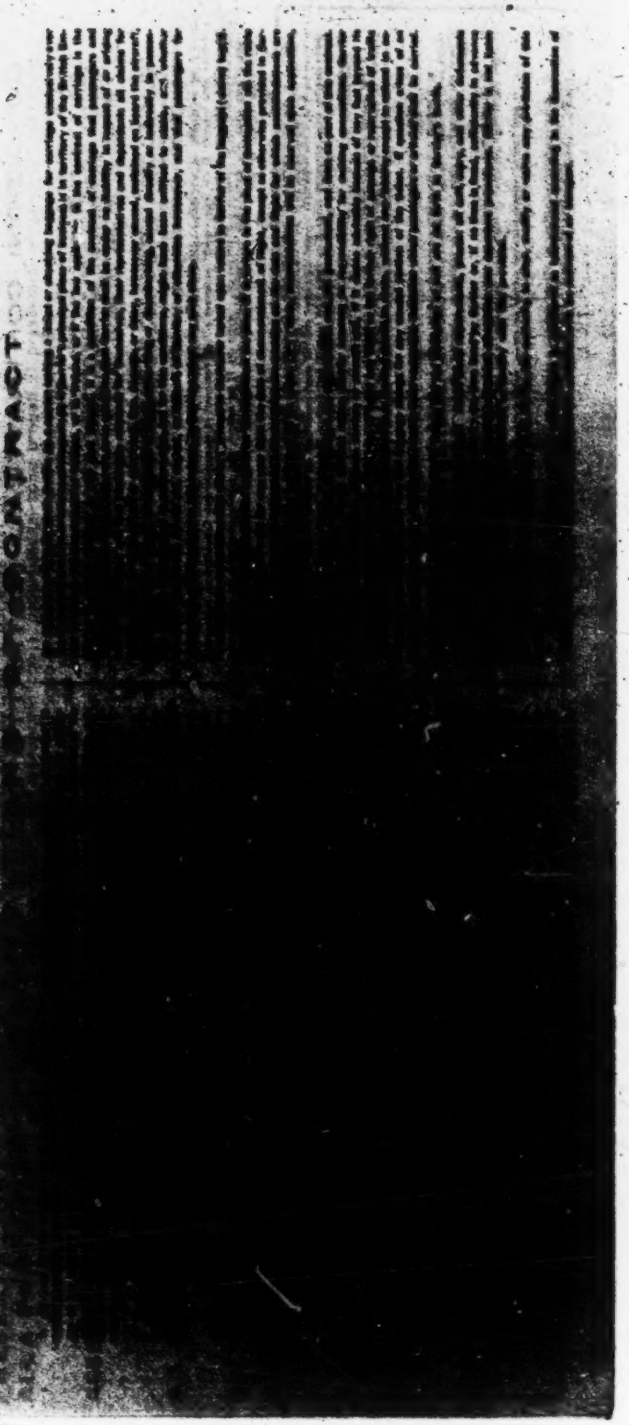

FORM NO. C-1 CONTRACT

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 552

(See Opposite) ☞

BIGLIETTO PASSEGGERI

CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

EMESSO DA
issued by

Nº 4049684

ALITALIA

LINEE AEREE ITALIANE

I.A.T.A. Member

Via Leonida Bissolati, 20 [illegible] (Italia)

4

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni esposte a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Exhibit A Annexed to Affidavit of Charles R. Angst

Alitalia Specimen Ticket of Form 554

(See Opposite) ☞

[26a]
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Affidavit of Nicholas Disclafani

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

NICHOLAS DISCLAFANI, being duly sworn, deposes and says:

I am one of the claimants herein, and I am one of the surviving children of my mother, Caterina Disclafani, who was killed in the crash of an Alitalia airplane while taking off from Shannon Airport on February 26, 1960.

Our family, consisting of my mother, my brother, Alfredo Disclafani, then age 14 (who was killed), my sister Maria Disclafani, then age 13, my brother, Giuseppe Disclafani, then age 11, and myself, then age 18, were travelling together from Tunisia to New York on Alitalia Airlines on tickets issued by Alitalia Airlines.

I recall seeing the tickets, but did not read them except for knowing that the tickets were for transportation from Tunisia to New York. I did not read the printed matter

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on the tickets, and I most definitely did not read the fine print, to which I paid no attention whatsoever.

The print was so small that it was discouraging rather than encouraging to read.

Affidavit of Nicholas Disclafani

I was with my mother when she acquired the tickets for all of us. To the best of my recollection, knowledge, in-

[27a]

formation and belief, my mother was in the same position with respect to the tickets as decribed above with respect to myself, and she did not at any time read the printed matter, and most particularly did not read the matter in fine print, nor did anyone at any time instruct us to read the same, nor call the same to our attention nor mention the Warsaw Convention. This applies to the rest of the family.

NICHOLAS DISCLAFANI

(Sworn to December 15, 1965.)

[28a]
—155—

Combined Affidavit of
Maria Disclafani and Giuseppe Disclafani

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

MARIA DISCLAFANI and GIUSEPPE DISCLAFANI, each being duly sworn, depose and say:

We have read the affidavit of our brother, Nicolas, and to the best of our recollection and knowledge, we believe the same to be true.

MARIA DISCLAFANI

GIUSEPPE DISCLAFANI

(Sworn to December 15, 1965.)

[29a]
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Affidavit of Rocco Cologgi

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

ROCCO COLOGGI, being duly sworn, deposes and says:

I am the claimant herein, and I am the husband of Rose Cologgi, and father of Barbara Cologgi, who were killed in the crash of an Alitalia airplane while taking off from Shannon Airport on February 26, 1960.

Our family, consisting of my wife, my daughter, Barbara, then age 21, and myself, were travelling together.

I recall seeing the tickets, but did not read them except for knowing that the tickets were for air transportation between Buffalo, New York and Rome, Italy. I did not read the printed matter on the tickets, and I most definitely did not read the fine print, to which I paid no attention whatsoever. The print was so small that it was discouraging rather than encouraging to read.

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To the best of my recollection, knowledge, information and belief, my wife and daughter were in the same position with respect to the tickets as described above as I was, and they did not at any time read the printed matter, and most particularly did not read the matter in fine print,

[30a]

nor did anyone at any time instruct us to read the same, nor call the same to our attention nor mention the Warsaw Convention.

/s/ Rocco Cologgi

(Sworn to December 14, 1965.)

[31a]
—158—

Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above entitled actions and I am fully familiar with the facts herein. I make this statement pursuant to the rules of this Court with respect to summary judgment, particularly Rule 9(g).

Statement Under Rule 9(g)

With respect to that branch of the motion for summary judgment concerning the sufficiency of the tickets in connection with the transportation herein under the requirements of the Warsaw Convention in that

(a) they do not make a prominent, clear and unequivocal statement that the transportation is subject to the Warsaw Convention rule of liability, as specifically required in the Convention;

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(b) the tickets are so profuse, their print is so microscopic, and their form and content generally so jumbled and confused as to constitute insufficient notice to the

[32a]

passenger that the Warsaw Convention is applicable to the transportation;

(c) and that the form of the tickets generally are so deficient as to constitute a failure of delivery of the tickets as required by the Warsaw Convention.

It is respectfully certified as follows:

There is no genuine issue to be tried in that the tickets in connection with the transportation involved herein which were issued to and in the possession of the respective plaintiffs or their decedents at the time they checked in at the airport of embarkation on the subject flight are as to the flight coupons contained in the envelope marked Exhibit A submitted on this motion by the defendant Alitalia, and as to the tickets as a whole, they were the same as the form ticket books contained in the envelope marked Exhibit B submitted on this motion by the defendant Alitalia.

WHEREFORE, it is hereby certified that there is no issue of fact as to the foregoing.

THEODORE E. WOLCOTT

(Sworn to February 15, 1966.)

[33a]
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Affidavit of Theodore E. Wolcott

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THEODORE E. WOLCOTT, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the above entitled actions and I am fully familiar with the facts herein. I make this amended statement pursuant to the rules of this Court with respect to plaintiffs' motion for partial summary judgment, particularly Rule 9(g).

It is respectfully certified as follows:

There is no genuine issue to be tried in that the tickets in connection with the transportation involved herein which were issued to and in the possession of the respective plaintiffs or their decedents at the time they checked in at the airport of embarkation on the subject flight are as to the flight coupons contained in the envelope marked

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Exhibit A submitted on this motion by the defendant Alitalia, and as to the tickets as a whole, they were the same as the form ticket books contained in the envelope marked Exhibit B submitted on this motion by the defendant Alitalia.

WHEREFORE, it is hereby certified that there is no issue of fact as to the foregoing.

THEODORE E. WOLCOTT

(Sworn to February 15, 1966.)

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Statement By Defendant Pursuant to General Rule 9 (g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
and consolidated cases

[SAME TITLE]

This Statement of material facts is submitted pursuant to General Rule 9 (g) of this Court and in opposition to the Statements submitted by plaintiffs, consisting of Affidavits of counsel for plaintiffs dated February 15 and February 16, 1966.

1. Plaintiffs' "Statement" of February 15, 1966 consists of nothing more than legal argument by plaintiffs' counsel. The only material facts which can be gleaned from the two Affidavits of plaintiffs' counsel are that the passenger tickets issued to and used by plaintiffs and their decedents on the subject flight were the tickets heretofore submitted to the Court in connection with this Motion; further, that these tickets had been delivered to each passenger before he was accepted as a passenger by defendant Alitalia on the subject flight.

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2. As to the form and contents of the passenger tickets, defendant states that the tickets heretofore submitted to the Court are the ones issued by defendant to each passenger and used by each passenger for the subject flight. Defendant does not accept and disagrees with the legal arguments set forth in plaintiffs' "Statement" of material

Statement By Defendant Pursuant to General Rule 9 (g)

[35a]

facts dated February 15, 1966, as to the description and contents of the tickets contained in said Statement.

3. Defendant submits that the only material facts necessary to a determination of the pending Motion of plaintiffs to strike the Warsaw defenses are the following:

I. On the face of each flight coupon contained in each passenger ticket issued to and used by each plaintiff, the following statements are set forth:

(a) "Issued by Alitalia-Linee Aeree Italiane, S.p.A.—Subject to Conditions of Contract on page 4"; and

(b) "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

II. Included in the Conditions of Contract on page 4 of each passenger ticket is the following provision:

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"2 (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention."

III. The passenger tickets used by the plaintiffs and their decedents on the subject flight had been delivered to them before they had been accepted as passengers. As evidenced by the flight coupons which have been submitted

Statement By Defendant Pursuant to General Rule 9 (g)

to the Court, the dates of issuance of the passenger tick-

[36a]

ets to plaintiffs and their decedents, respectively, were as follows:

Angelina Farina	19 February 1960
Rocco Cologgi	27 January 1960
Barbara Cologgi	27 January 1960
Rose Cologgi	27 January 1960
Caterina Disclafani	22 February 1960
Nicola Disclafani	22 February 1960
Maria Disclafani	22 February 1960
Giuseppe Disclafani	22 February 1960
Alfredo Disclafani	22 February 1960
Mrs. Zocci Lisi	Exchange Order for transportation originally issued 8 February 1960—subsequent date of issue of passenger ticket cannot be determined from copies.
John Lisi	
Frank Lisi	
Joseph Maiorano	20 January 1960

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4. The flight on which the foregoing persons traveled pursuant to their respective passenger tickets departed Rome at 9:00 p.m., 25 February 1960.

Statement By Defendant Pursuant to General Rule 9 (g)

Dated: New York, New York
February 18, 1966

Respectfully submitted,

CONDON & FORSYTH

By s/ .....
Attorneys for Defendant

[37a]
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Letter dated February 23, 1966

(Letterhead of Reynolds, Wolcott & Flack)

February 23, 1966

Hon. Lloyd F. MacMahon
U. S. D. J.
United States Courthouse
Foley Square
New York, N. Y. 10007

Re: Como and Lisi v. Alitalia
and related cases

Dear Judge MacMahon:

I am in receipt of statement of defendant Alitalia. It is evident that defendant has raised no issue as to the facts certified in plaintiff's statement, as confirmed in plaintiff's amended statement.

Plaintiffs are willing to concede that the respective tickets were made out on the dates stamped on the coupons, with the proviso that such stamps do not necessarily fix the time from the inception of which the tickets were in the actual possession of the respective passengers. Plaintiffs makes no objection to item 4 of defendant's statements.

I respectfully take this opportunity to recall to Your Honor that during the discussion of this matter by all counsel with you on Friday, February 11, 1966, it was conceded by all parties that the entire alleged notice given

Letter dated February 23, 1966

[38a]

to the passengers is contained in the ticket and no other notice was given.

Respectfully submitted,

Theodore E. Wolcott
Attorney for Plaintiffs

TEW/rh

cc: Condon & Forsyth, Esqs.
Louis G. Carlo, Esq.

[39a]

Opinion by MacMahon, *D.J.*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 4365
and consolidated cases

[SAME TITLE]

APPEARANCES:

THEODORE E. WOLCOTT, Esq.
New York, N. Y.
Attorney for Plaintiffs

CONDON & FORSYTH, Esqs.
New York, N. Y.
(GEORGE N. TOMPKINS, JR., Esq.,
New York, N. Y., of counsel)
Attorneys for Defendant

MACMAHON, *District Judge*

These are consolidated actions for death, personal injuries or property damage suffered by passengers in a crash of defendant's airplane on February 26, 1960, in

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Shannon, Ireland, while en route from Rome to New York. Plaintiffs are residents and citizens of New York, and defendant is an Italian corporation. Jurisdiction is based on diversity.

Plaintiffs move for partial summary judgment dismissing all affirmative defenses which are based on the exclusion or limitation of liability provisions (Articles 20

[40a]

and 22) of the Warsaw Convention,[1] 49 Stat. 3000 (1934). All of the evidentiary facts material to the motion appear on the face of the tickets issued to the passengers on the flight involved, and there is no dispute about them.[2] Plaintiffs claim that these exculpatory defenses are not available to an airline unless the airline delivers a passenger ticket and, where applicable, a baggage check, which no-

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[1] The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air." With but a single reservation immaterial here, adherence was advised June 15, 1934; declared June 27, 1934; and proclaimed October 29, 1934. See 49 Stat. 3000 et seq. (1934).

Article 20(1) provides:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22 provides:

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [$8,300]. . . .

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger."

On November 15, 1965, the United States formally denounced the Warsaw Convention, effective May 15, 1966, unless the airlines serving the United States agree to raise the limitation on liability to $75,000, and ultimately to $100,000. See Kreindler, The Denunciation of the Warsaw Convention, 31 J. Air L. & Com. 291 (1965). Such denunciation does not affect these actions.

[2] The parties have submitted affidavits complying with Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

[41a]

tify the passenger that the exclusion or limitation of liability provisions of the Warsaw Convention are applicable to the flight, and that the tickets and checks delivered here did not notify the passengers of such provisions. Defendant claims that if a ticket and check are delivered to a passenger before departure, such defenses are automatically applicable to flights between nations adhering to the Convention even though the ticket and check do

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not notify the passenger of such provisions, and that, in any event, the tickets and checks delivered here so notified the passengers.

[1] The Warsaw Convention specifies that the provisions of the Convention which exclude or limit an airline's liability are unavailable unless the airline delivers a passenger ticket and baggage check.[3] The Convention also requires that the ticket and check contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention."[4] Read together, the intent of these requirements is to afford the passenger a reasonable opportunity to take measures to protect himself against the airline's exclusion or limitation of its liability. Indeed, the Convention specifically provides that "the carrier and the passenger may agree on a higher limit

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[3] Article 3(2) provides in pertinent part:

"[I]f the carrier accepts a passenger without a passenger ticket having been delivered, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

Article 4(4) provides in pertinent part:

"[I]f the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at . . . [4(3)] (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

[4] Articles 3(1)(e) and 4(3)(h).

[42a]

of liability."[5] Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance.

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[2] We hold, therefore, that compliance with the Convention requires not mere physical delivery of a ticket and check before departure but delivery of a ticket and check which notify the passenger that the provisions of the Convention which exclude or limit liability are applicable.[6] *Cf. Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed. 2d 64 (1965); *Warren* v. *Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965); *Block* v. *Compagnie Nationale Air France*, 229 F. Supp. 801, 808 (N.D.Ga. 1964); Sand, Air Carriers'

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[5] Article 22(1).

[6] Article 4(4), pertaining to baggage checks (see footnote 3), specifically bars a carrier from excluding or limiting its liability under the Convention if it (a) fails to deliver a baggage check, or (b) delivers a baggage check which does not contain the required statement. However, Article 3(2), pertaining to passenger tickets, specifies only one ground for barring a carrier from excluding or limiting liability, namely, failure to deliver a passenger ticket. Defendant argues from this that in cases involving personal injury and death, the absence of the required statement from the passenger ticket is meaningless, and that so long as a passenger ticket is delivered before the passenger boards the plane, the carrier can exclude or limit liability. To support this contention, it cites *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D. N. Y. 1950), *aff'd*, 227 F. 2d 282 (1955), *cert. denied*, 350 U. S. 989, 76 S. Ct. 476, 100 L. Ed. 855 (1956). There it was held that a carrier could limit its liability for wrongful death even though it had failed to comply with Article 3(1)(c) by stating in the passenger ticket all the agreed places where the plane was to stop. However, we think the difference in importance between the statements required by Articles 3(1)(e) and 3(1)(c) destroys any argument that their absence from the ticket should be treated alike.

[43a]

Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. 260, 262-63 (1962). Thus, if the tickets and checks issued here did not so notify the passengers, the challenged affirmative defenses are unavailable and must be dismissed.

We are of the opinion that a jury could not reasonably find that the passenger tickets and baggage checks delivered here notified the passengers that the exclusion or limitation provisions of the Convention were applicable and, accordingly, hold as a matter of law that defendant cannot exclude or limit its liability under the Convention in the case at bar. We think one look at the tickets and checks, which were combined in the form of small printed booklets, com-

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pels this conclusion. We set forth below replicas of the only applicable pages of typical tickets delivered here:

Outside Front Cover

(See Opposite) ☞

BIGLIETTO PASSEGGERO
E
CONTROLLO BAGAGLIO

PASSENGER TICKET and BAGGAGE CHECK

2253538

ESSO DI

Issued

ALITALIA

LINEE AEREE ITALIANE

I.A.T.A. Member

Viale Maresciallo Pilsudski, 92 - ROMA (Italia)

2

Ogni passeggero dovrà esaminare attentamente questo biglietto e particolarmente le Condizioni esposte a pag. 3.
Each passenger should carefully examine this ticket, particularly the Conditions on page 4.

Opinion by MacMahon, D.J.

Page 4 of the Booklet [46a]

CONDITIONS OF CONTRACT

1. As used in this contract, « ticket » means « Passenger Ticket and Baggage Check », « carriage » is equivalent to « transportation », and « carrier » includes the air carrier issuing this ticket and all air carriers that carry or undertake to carry the passenger or his baggage hereunder or perform any other services incidental to such air carriage; « damage » includes death, injury, delay, loss or destruction of whatsoever nature arising out of or in connection with carriage or other services performed by carrier hereunder. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

2. a) Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (hereinafter called « the Convention ») unless such carriage is not « international carriage » as defined by the Convention. (The carrier's tariffs, conditions of carriage for such definition). Carrier's name may be abbreviated on the ticket, the full name of its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables; and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in this ticket and any connection ticket issued hereunder, or, as shown in carrier's timetables as scheduled stopping places on the passenger's route.

b) To the extent not in conflict with the foregoing, all carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention or amending the rules of the Convention to carriage which is not « international carriage » as defined in the Convention), government regulations, orders and requirements, (ii) provisions herein set forth, (iii) applicable tariffs, and (iv) accepted by transportation hereunder a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables (but not the time of departure and arrival thereto) of each carrier, which are made part thereof and which may be examined at any of its offices and at airports from which it operates regular services.

c) Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws.

3. Insofar as any provision contained or referred to herein, may be contrary to a law, government regulation, order or requirement, which invalidly cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the footnote of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not affect any other part.

4. Subject to the foregoing:

a) Liability of carrier for damages shall be limited to approximate on an even basis, except in the case of checked baggage as to which the passenger also has a right of action against the first or last carrier. A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent.

b) Carrier is not liable for damage to passenger or unchecked baggage unless such damage is caused by the negligence of carrier

c) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders or requirements, or from failure of passenger to comply with same.

d) Any liability of carrier is limited to 250 French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5,000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's regulations. In that event the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

e) Any exclusion or limitation of liability of carrier under these conditions shall apply to agents, servants or representatives of the carrier acting within the scope of their employment and also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment.

5. Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon presentation of all original parts and carrier under carrier's contract of carriage or tariff.

6. Where validated, this ticket is good for carriage from the airport or the place of departure to the airport or the place of destination via the route shown herein and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in carrier's regulations. Each flight coupon will be accepted for carriage on the date and flight for which accommodation have been reserved when flight coupons are issued on an « open date » basis, accommodations will be reserved upon application subject to availability of space.

7. Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Delayed flights, carrier may without notice substitute alternate carriers or aircraft and may alter or omit the stopping place shown on the face of the ticket in case of necessity. Times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of this contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections.

8. The passenger shall comply with all government travel requirements, present all visas, exit and other documents required by the law, and arrive at the airport by the time fixed by carrier or, if no time is fixed, sufficiently in advance of flight themselves to permit completion of government formalities and departure procedures. Carrier is not liable for loss or expense due to passenger's failure to comply with this condition.

9. No agent, employee or representative of carrier has authority to alter, modify or waive any provision of this contract.

10. No claims shall be in the case of damage to baggage unless the person entitled to delivery complains to the carrier forthwith after the discovery of the damage and, at the latest, within seven days from the date of receipt and in the case of delay, within twenty-one days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing and forwarded within the time aforesaid. Where nothing is paid a transportation damage or delay in baggage, failure to give notice shall not be a bar to such claims whatever person has to be sent reasonably possible for him to give such notice, or [illegible] notice was not given due to fraud on the part of carrier, or [illegible] agent had knowledge of damage to passenger's baggage.

11. Any right to damages against carrier shall be extinguished unless an action is brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The method of calculating the period of limitation shall be determined by the law of the court [illegible] of the case.

Carriage effected wholly within the territory of [illegible], which causes for annulment, « international carriage » as defined by the Warsaw Convention, is governed the notice time and the liability regarding damages of Damage by Air.

Opinion by MacMahon, D.J.

[47a]

One of the Coupons

(See Opposite) ☞

ALITALIA

LINEE AEREE ITALIANE

BIGLIETTO PASSEGGERI E CONTROLLO BAGAGLIO
Passenger Ticket and Baggage Check

TAGLIANDO DI VOLO N. **2**

MODELLO Form **552**

Nº 2122677

EMESSO DA

DA TUNIS

A NEW-YORK

PASSAPORT Nº 2428732 P ISSUED

GIRATE ITAL EMIGRANT 1-152 3343

DATA E LUOGO DI EMISSIONE DEL BIGLIETTO
Date and place of issue of this ticket

ITALIA
12 FEB
TUNIS

DA TUNIS

A ROME

A NEW-YORK

VETTORE Az

VOLO 618

DATA 25/2

ORA

RICONVALIDATO DA

UFFICIO Az TUNIS DATA 24/2/

MR DI SCLAFANI ALFREDO

[48a]
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The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2(a) camouflaged in Lilliputian print in a thicket of "Conditions of Contract" crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed.

"Lilliputian typography," *Eck* v. *United Arab Airlines, Inc.*, 20 App.Div.2d 454, 457 n.2, 247 N.Y.S.2d 820, 824, *rev'd on other grounds*, 15 N.Y.2d 53, 255 N.Y.S.2d 249, 203 N.E.2d 640 (1964), which must be read through "a magnifying glass," *Warren* v. *Flying Tiger Line, Inc.*, 234 F.Supp. 223, 230 (S.D. Cal. 1964), *aff'd*, 352 F.2d 494 (9th Cir. 1965), is at war with the intent of the Convention. This was recognized by our Court of Appeals in *Mertens* where one of the reasons for precluding the carrier from limiting its liability under the Convention was that the required statement "was printed in such a manner as to

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virtually be unnoticeable and unreadable. . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 341 F.2d at 857.

We hold, therefore, that defendant failed to comply with Articles 3(1)(e) and 4(3)(h) of the Warsaw Convention and that the challenged affirmative defenses are unavailable to defendant in these actions.[7]

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[7] Plaintiffs also argue that the statements in the tickets and checks are wholly inadequate because framed in conditional terms. However, we think this argument meritless. If the statements were noticeable and

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Our decision involves a controlling question of law which we think should be immediately appealed under 28 U.S.C. § 1292(b). *Cf. Warren* v. *Flying Tiger Line, Inc., supra* 352 F.2d at 495. We have done our best to reconcile *Mertens* and *Grey* (see footnote 6), but until the Court of Appeals has had the last word, there will remain substantial ground for difference of opinion on whether failure to notify in accordance with Article 3(1)(e) has the effect we say, and whether the defendant failed to notify here as a matter of law. To clear the air on the law applicable to the facts shown here, an appeal is advisable. Moreover, an immediate appeal may materially advance the ultimate termination of this litigation.

Accordingly, plaintiffs' motions for partial summary judgment dismissing defendant's affirmative defenses are

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granted, and trial of the actions stayed pending decision of the Court of Appeals on the controlling question of

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readable, the passenger would have been sufficiently alerted to defendant's intention to use the Convention, wherever applicable, as a shield to ward off liability. This being so, the passenger could have called into play a variety of protective measures. *Accord, Seth* v. *British Overseas Airlines Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858, 85 S. Ct. 114, 13 L. Ed. 2d 61 (1964); *Samuel Montague & Co.* v. *Swiss Air Transport Co.*, English Court of Appeals, Jan. 21, 1966.

A third argument made by plaintiff Como representing members of the Disclafani family, whose journey originated in Tunisia, is that since the official language of Tunisia is Arabic, and the tickets were printed in English and Italian, the Disclafanis were not given notice. We do not reach this argument here. For the purposes of this motion, plaintiff Como has withdrawn a fourth argument that Tunisia was not a party to the Convention at the time the Disclafanis commenced their journey.

whether the challenged affirmative defenses are available to defendant in the light of the facts shown here.

So ordered.

Dated: New York, N. Y.
April 1, 1966

/s/ LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

ADDITIONAL PROCEEDINGS

IN COURT OF APPEALS

FOR SECOND CIRCUIT

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 30543

JOHN LISI, Estate

—v.—

ALITALIA LINEE AEREE ITALIANE, S.p.A.

4- 7-66	Filed motion for leave to appeal under Rule 1292 (b) (& in 30544 thru 47)
4-12-66	Filed affidavit in response to motion for leave to appeal (& in 30544 thru 30547)
4-14-66	Motion for leave to appeal granted (endorsed)—and filed order (& in 30544 thru 30547)
4-18-66	Filed motion to add to general calendar to be heard before summer recess, etc. (& in 30544 thru 30547)
4-25-66	Filed affidavit in opposition to motion to add to general calendar, etc. (& in 30544 thru 30547)
4-25-66	Filed order denying motion for preference, etc. (& in 30544 thru 30547)
5-19-66	Filed motion to limit record (& in 30544 thru 30547)
5-23-66	Motion to limit record withdrawn in Open Court (& in 30544 thru 30547)

Docket Entries

5–25–66	Filed record (original papers of District Court) (& in 30544-47)
6–16–66	Filed order extending time to file appellant's brief & appendix to 7-22-66; appellees brief & appendix, if any by 9-2-66; appellant's reply brief if any by 9-16-66 (& in 30544-5-6-7)
7– 7–66	Filed motion for leave to file brief as amicus curiae (Speiser, Shumate, etc.) (& in 30544 thru 47)
7–12–66	Filed memorandum in opposition to motion for leave to file brief as amicus curiae (& in 30544 thru 7)
7–15–66	Motion for leave to file brief as amicus curiae denied (endorsed)—and filed order (& in 30544-7)
7–22–66	Filed appendix, appellant (& in 30544 thru 30547)
7–22–66	Filed brief, appellant (& in 30544 thru 30547)
8–16–66	Filed motion to extend time to file appellees brief, etc. (& in 30544 thru 30547)
8–19–66	Filed affidavit of service (& in 30544 thru 30547)
8–19–66	Appellee shall file brief by 10-7-66; appellant's reply brief by 10-24-66 (& in 30544-7)
9–29–66	Filed motion to adjourn argument; extend time to file appellees brief (& in 30544 thru 7)
9–30–66	Filed application and order (endorsed) denying motion to adjourn the argument of appeal (& in 30544 thru 47)

Docket Entries

9–30–66	Filed affidavit in opposition to motion for adjournment (& in 30544 through 47)
10– 7–66	Filed brief, appellees (& in 30544 thru 47)
10–24–66	Filed reply brief, appellant (& in 30544 thru 47)
10–26–66	Argument heard (by: Lumbard, ChJ., Moore & Kaufman, CJJ)
12–16–66	Judgment Affirmed, Kaufman, CJ (& in 30544 thru 7)
12–16–66	Dissenting in separate opinion, Moore, CJ (& in 30544 thru 7)
12–16–66	Filed judgment
12–29–66	Filed petition for rehearing and rehearing in banc (& in 30544 thru 7)
2– 6–67	Petition for rehearing denied, Per Curiam (& in 30544 thru 7)
2– 6–67	Filed order denying petition for rehearing (& in 30544 thru 7)
2– 6–67	Petition for rehearing in banc denied, Per Curiam (& in 30544 thru 7)
2– 6–67	Filed order denying petition for rehearing in banc (& in 30544 thru 7)
2– 6–67	Filed motion to stay issuance of mandate (& in 30544 thru 7)
2–20–67	Motion to stay issuance of mandate granted under Rule 28(c) (endorsed)—and filed order (& in 30544 thru 7)
3– 3–67	Certified appendices and proceedings to Condon & Forsyth, Esqs. (& in 30544 thru 7)

Docket Entries

3–21–67	Filed certificate of filing of petition for writ of certiorari (& in 30544 thru 47)
3–22–67	Filed notice of filing of petition for writ of certiorari (& in 30544-thru 47)
11– 9–67	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 30544-5-6-7)

Opinion of Court of Appeals for Second Circuit

(13)*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 91-95—September Term, 1966.

(Argued October 26, 1966 Decided December 16, 1966.)

Docket Nos. 30543-4-5-6-7

JOHN LISI, etc., *et al.*,

Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Appellant.

Before:

LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal, pursuant to 28 U. S. C. §1292(b), from a partial summary judgment, MacMahon, *J.*, United States District Court for the Southern District of New York, dismissing appellant's affirmative defenses based on the Warsaw Convention, 49 Stat. 3000, et seq.

Judgment affirmed.

GEORGE N. TOMPKINS, JR., New York, N. Y. (Austin P. Magner, Condon & Forsyth, New York, N. Y., on the brief), *for appellant.*

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* Figures in bold parentheses refer to pages of Appendix to Petition for Writ of Certiorari.

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THEODORE E. WOLCOTT, New York, N. Y. (Alfred W. Gans, New York, N. Y., on the brief), *for appellees.*

KAUFMAN, *Circuit Judge:*

The question presented on this appeal is whether Alitalia's liability, arising from the crash of one of its planes, is limited by the provisions of the so-called Warsaw Convention.[1]

On February 26, 1960, while en route from Rome to New York, Alitalia's airplane crashed shortly after taking off from Shannon, Ireland. Five suits were brought and consolidated in the District Court for wrongful death, personal injuries and property damage, allegedly suffered by thirteen of the passengers aboard the craft at the time of the disaster. The appellees are citizens of New York, while appellant is an Italian corporation. Jurisdiction is based on diversity of citizenship, 28 U. S. C. §1332(a)(2).

In answering the complaints, Alitalia pleaded as affirmative defenses those Articles of the Convention which serve to exclude or limit an airline's liability to its passengers. Prior to trial, the appellees moved for a partial summary judgment to dismiss these affirmative defenses, asserting that they were not available because appellant had failed properly to notify the passengers of the applicability of the

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[1] 49 Stat. 3000-26. The official title is "Convention for the Unification of Certain Rules Relating to International Transportation by Air," hereinafter referred to as "Convention."

The Convention was concluded at Warsaw, Poland, on October 12, 1929, and proclaimed by President Roosevelt on October 29, 1934. Over ninety countries have become signatories to the Convention.

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Convention. Judge MacMahon agreed with appellees and granted their motion. He also stayed the trial pending decision by us "on the controlling question of whether the challenged affirmative defenses are available to defendant [Alitalia] in the light of the facts shown here." 253 F. Supp. 237, 243 (S. D. N. Y. 1966). This Court granted appellant's application for leave to appeal pursuant to 28 U. S. C. §1292(b).[2]

I.

It is conceded that the flight in question meets the definition of "international transportation" contained in Article 1 of the Convention.[3] Therefore, the provisions of the Convention quite properly govern the present action. See *Eck* v. *United Arab Airlines*, 360 F. 2d 804, 808 (2d Cir. 1966).

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[2] "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[3] "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. . . .

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated within the territories of two High Contracting Parties. . . ." 49 Stat. 3014.

Alitalia's main argument can be stated quite simply. Under Articles 17 and 18 of the Convention, 49 Stat. 3018-19, the carrier is liable for the death or bodily injuries suffered by passengers while on board its aircraft, and for destruction or loss of checked baggage. But, this liability, it says, is limited by Article 22, 49 Stat. 3019, which provides:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs [approximately $8300] . . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.[4]
>
> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs [approximately $17] per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. . . .
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs [approximately $332] per passenger.

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[4] Prior to the Hague Protocol of 1955 (see note 7, *infra*), the carrier was not liable even for this limited amount "if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures," Article 20, 49 Stat. 3019; or if "the carrier proves that the damage was caused or contributed to by negligence of the injured person [and] the court . . . in accordance with the provisions of its own law, exonerates the carrier wholly or partly from his liability." Article 21, 49 Stat. 3019.

It is clear, however, that under other Articles of the Convention, these limitations on liability are not applicable if the carrier fails to deliver to the passenger a ticket or

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a check for baggage.[5] These Articles, moreover, provide that the ticket and check shall contain certain specified information, including "a statement that the transportation is subject to the rules relating to liability established by this convention."[6] Thus, it would appear, that unless the carrier furnishes to the passenger a ticket or baggage check containing the appropriate statement, it may not restrict its liability as circumscribed by the Convention Articles.

Alitalia responds, however, by arguing that there is a crucial difference in the language between Articles 3 and 4. While Article 4(4), it says, denies the carrier limited liability "if . . . [it] accepts baggage without a baggage check having been delivered, *or if the baggage check does not contain the particulars*" specified (emphasis added), the only ground stated in Article 3(2) for denying limited liability for the personal injuries or death of passengers, is the carrier's failure to deliver a ticket. Thus, we are asked to apply the principle *expressio unius est exclusio alterius* and to hold that failure to give notice on the passenger ticket that the flight is subject to the Convention's rules, will not deprive the carrier of the substantial de-

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[5] "[I]f the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." Article 3(2), 49 Stat. 3015.

"[I]f the carrier accepts baggage without a baggage check having been delivered . . . the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liabilty." Artcle 4(4), 49 Stat. 3016.

[6] Article 3(1)(e), 49 Stat. 3015; Article 4(3)(h), 49 Stat. 3016.

limitation of liability for personal injuries or death. All that is required, urges Alitalia, for this right to vest, is that a ticket be delivered to the passengers.

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II.

It is apparent that Alitalia relies on a literal reading of the Convention for its assertions. We reject the interpretation it urges upon us. While it is true that the language of the Convention is relevant to our decision, it must not become, as Justice Frankfurter stated it, a "verbal prison." *Sullivan* v. *Behimer,* 363 U. S. 335, 358 (1960) (Frankfurter, *J.,* dissenting). The task of ascertaining the meaning of words is difficult, and one certain way of misinterpreting them is by a literal reading. As Learned Hand put it, "words are such temperamental beings that the surest way to lose their essence is to take them at their face." 1942 Address by Judge Hand to the Massachusetts Bar Association. Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra.*

This is not the first occasion on which we have been called upon to intepret the language of the Convention's delimiting provisions. For example, in *Mertens* v. *Flying Tiger Line, Inc.,* 341 F. 2d 851 (2d Cir.), *cert. denied,* 382 U. S. 816 (1965), we were asked to decide whether presenting a ticket to a passenger after he boarded the carrier's plane, constituted a "delivery" within the meaning of Article 3(2). We stated:

> We read Article 3(2) to require that the *ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to pro-*

tect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special

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contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that "the carrier and the passenger may agree to a higher limit of liability," (Article 22(1)) and there would be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (Article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket *be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.*" *Id.* at 856-57 (emphasis added).

We held, accordingly, that the delivery was inadequate, and the Convention's fixed limits of liability were not available.

Later, a similar result was reached by the Ninth Circuit in *Warren* v. *Flying Tiger Line, Inc.*, 352 F. 2d 494 (1965). There the passenger was given a "boarding ticket" or "pass" at the foot of the ramp leading to the aircraft. The Court decided that the "delivery" must be made sufficiently in advance so that the passenger will have the opportunity to take self-protective measures, such as purchasing additional insurance if he so chooses. The "delivery" of a boarding ticket at the foot of the ramp as the plane was about to depart, did not suffice therefore. The carrier, accordingly, was barred by Article 3(2) from availing itself of the Convention's liability limitation provisions.

We believe that the reasoning of the *Mertens* and *Warren* decisions is apposite to the case now before us. The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized[7]—are advantageous to (20) the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit.

This notice to passengers is especially important in this country where the overwhelming number of people who travel by air do so on domestic flights, for which the Convention's restrictions on liability are inapplicable. It

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[7] See generally Sand, "Air Carriers' Limitations of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention," 28 *J Air L. & Com.* 260 (1961-62).

Criticism of the Convention's limits on liability began to crystallize in the early 1950's as a result of the impact on the public arising from a plane crash in 1943, in which the entertainer Jane Froman was seriously injured. Despite the extent of her injuries, the size of her medical bills, and the curtailment of her blossoming career, her award against Pan American was limited to $8300. *Ross* v. *Pan American Airways,* 299 N. Y. 88 (1949), *cert. denied, sub nom. Froman* v. *Pan American Airways, Inc.,* 349 U. S. 947 (1955). See Kreindler, "The Denunciation of the Warsaw Convention," 31 *J. Air L. & Com.* 291, 294 (1965).

In 1955, the Hague Conference was called, and from it came the so-called Hague Protocol, which would have doubled the limits on liability for personal injuries to $16,600. Although signed by the United States, it was not ratified by the Senate.

On November 15, 1965, the United States sent a Notice of Denunciation to the Polish Government stating that this country opposed the Convention's low limits on liability for personal injuries, and would withdraw from the Convention at the end of six months, pursuant to Article 39, 49 Stat. 3022. *Id.* at 303. The State Department made it

is too much to expect these passengers to be sufficiently sophisticated to realize that although they are traveling the same number of miles on an international flight that they have frequently traveled domestically, the amount they may

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recover in the event of an accident is drastically reduced. In short, it is clear from the *ratio decidendi* of the *Mertens* and *Warren* cases, that the inquiry that must be made if the Convention's Articles are to be given meaning, is "whether the ticket was delivered to the passenger in such a manner as to afford him a reasonable opportunity to take self-protective measures . . . ." *Mertens* v. *Flying Tiger Line, Inc., supra* at 857.[8]

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known, however, that the denunciation would be withdrawn if the world's international air carriers agreed to raise the limitation first to $75,000 and ultimately to $100,000. An interim agreement was reached among the carriers, including Alitalia, in the Spring of 1966, providing for limits of liability of $58,000 plus costs of litigation, or $75,000 inclusive of costs of litigation, under conditions of absolute liability. On May 14, 1966, the United States withdrew its previous "Notice of Denunciation." See "The Warsaw Convention—Recent Developments and the Withdrawal of the United States Denunciation," 32 *J. Air L. & Com.*, No. 2, p. 243 (1966).

[8] Alitalia's reliance on *Grey* v. *American Airlines*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956), is misplaced. In that case defendant's plane, while en route from New York to Mexico City, crashed near Dallas. Although the flight was scheduled to make stops at Washington, D. C. and Dallas, this information was not contained on the ticket given to the plaintiffs, despite the provision in Article 3 of the Convention that all "agreed stopping places" shall be listed. Plaintiffs claimed that because of this omission, defendant was precluded from claiming limited liability under the Convention. Plaintiffs' motion to strike the carrier's defenses based on the Convention was denied by the district court, 95 F. Supp. 756 (S. D. N. Y. 1950), and we affirmed, finding that the motion was based on a "technical and wholly unsubstantial alleged omission" 227 F. 2d at 284.

Our decision in *Grey* is perfectly consistent with the holdings in *Mertens* and *Warren, supra*. In *Grey*, the plaintiffs boarded the plane in New York and were headed for Mexico City. The fact that the ticket failed to list the intermediate stops in Washington, D. C. and Dallas, in no way deprived them of "a reasonable opportunity to take self-protec-

III.

We proceed to determine, therefore, whether the particular tickets and baggage checks involved in the present case gave the appellees adequate notice.[9] On the front of the ticket and baggage check, in exceedingly small print, was the following message: "Each passenger should carefully examine this ticket, particularly the Conditions on page 4." And, at this point, we note that one of our reasons in *Mertens* v. *Flying Tiger Line, Inc.*, *supra*, for precluding the carrier from limiting its liability under the Convention was that the required statement on the ticket "was printed in such a manner as to virtually be unnoticeable and unreadable . . ." *Id.* at 857.

Judge MacMahon appropriately characterized the "notice" to the passengers in his pithy conclusion as "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that their presence is concealed."[10] 253

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tive measures," since those stops did not change the "international" character of the flight so far as plaintiffs were concerned. See Article 1. Therefore, "delivery" of the ticket had taken place, and the defendant was entitled to avail itself of the Convention's limits on liability.

[9] The parties have agreed that this is a question of law for the court to resolve. A replica of the ticket may be found in the district court's opinion, 253 F. Supp. at 240-42.

[10] Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon. For example, the passenger is referred to the carrier's tariffs in order to determine whether his flight is considered "international carriage"; and the carrier's liability is expressed in terms of "French gold francs

F. Supp. at 243. Accord, *Warren* v. *Flying Tiger Line, Inc.*, *supra* at 497. But see *Seth* v. *British Overseas Airways*.

(consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths)."

In 1963, the Civil Aeronautics Board took cognizance of the difficulty that the average passenger would have interpreting this language and issued what is now 14 C. F. R. §221.175, which provides in part:

(a) In addition to the aforesaid requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself (23) of the limitation on liability to passengers provided by the Warsaw Convention, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention and whose place of departure or place of destination is in the United States, the following statement in writing:

Advice to International Passengers on
Limitation of Liability

Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to their entire journey including the portion entirely within the countries of departure and destination. The Convention governs and in most cases limits the liability of carriers to passengers for death or personal injury to approximately $8,290 and limits liability for loss or damage to baggage.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention. For further information please consult your airline or insurance company representative.

Provided, however, That when the carrier elects to agree to a higher limit of liability to passengers than that provided in Article 22(1) of the Warsaw Convention, such statements shall be modified to reflect the higher limit. The statement prescribed herein shall be printed in type at least as large as ten point modern type and in ink contrasting with the stock on (1) each ticket; (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope.

(b) Each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by the Warsaw Convention, shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in

Corp., 329 F. 2d 302 (1st Cir.), *cert. denied*, 379 U. S. 858 (1964).

We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant.

Affirmed.

MOORE, *Circuit Judge* (dissenting):

The majority in their opinion indulge in judicial treaty-making. The language of the treaty (referred to as the Warsaw Convention) is clear. Its provisions are not difficult to comprehend. Its mandates are simply stated. Ascertainment of compliance should, therefore, present no real problem.

Passenger tickets were delivered to plaintiffs and their decedents on various dates between January 20, 1960 and February 20, 1960. The flight on which they travelled pursuant to their tickets did not depart until February 25, 1960. The ticket contained the particulars specified in Article 3(1) of the Convention, albeit the reference to the provisions of the Convention with respect to death or injury was in exceedingly small type.

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the United States which is in charge of a person employed exclusively by it or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier to sell tickets to passengers whose transportation may be governed by the Warsaw Convention and whose place of departure or destination may be in the United States, a sign which shall have printed thereon the statement prescribed in paragraph (a) of this section. Such statement shall be printed in bold face type at least one fourth of an inch high.

The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a "one-sided advantage" is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability. To support their argument they refer, quite illogically in my opinion, to cases in which the courts have held that there was no real delivery of a ticket to the passenger as contemplated by the treaty.

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Cases based upon facts tantamount to no effective pre-flight ticket delivery,[1] are scarcely relevant to this case where the passengers had their tickets from 3 to 36 days before departure. Were actual notice to be the requirement, every airline would have to have its agents explain to every passenger the legal effect of the treaty and, in all probability, insist that each passenger be represented by counsel who would certify that he had explained the import of the Convention to his client who, in turn, both understood and agreed to the limitation.

The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this result is obtained by ostensibly adding to the treaty a requirement of actual

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[1] *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2 Cir. 1965) (Military officer already on board an aircraft about to take off when ticket delivered); *Warren* v *Flying Tiger Line, Inc.*, 352 F. 2d 494 (9 Cir. 1965) (Soldiers handed boarding tickets at foot of ramp leading to plane about to take off); *Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2 Cir. 1966) (Warsaw Convention involved only on question of jurisdiction and venue).

understanding notice. Furthermore, for the courts to say that a jury could not reasonably have found that the ticket gave the passenger the required notice is, upon a motion for partial summary judgment, to usurp the time-honored function of the jury.

For these reasons, I would reverse.

Judgment in *Lisi* v. *Alitalia*

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

(27)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#91

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Maiorano* v. *Alitalia*

(28)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOSEPH MAIORANO,
Plaintiff-Appellee,

—v.—

ALITALI-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(29)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#92

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Como* v. *Alitalia*

(30)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NICOLINA COMO, as Guardian *ad Litem* of NICOLAS DISCLAFANI, MARIA DISCLAFANI and GIUSEPPE DISCLAFANI, and as Administratrix of the Estate of CATERINA DISCLAFANI, deceased and ALFREDO DISCLAFANI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

(31)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#93

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *Cologgi* v. *Alitalia*

(32)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROCCO COLOGGI, Individually, and as Administrator of the Estate of ROSE COLOGGI, deceased and of BARBARA COLOGGI, deceased,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(33)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#94

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Judgment in *DiBiase v. Alitalia*

(34)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

ROSINA DIBIASE, Individually, and as Administratrix of the Estate of NOTTE FARINA, deceased,
Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment in DiBiase v. Alitalia

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

(35)

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

#94

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED DECEMBER 16, 1966
A. DANIEL FUSARO, *Clerk*

Memorandum Opinion Denying Petition for Rehearing

(36)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

CONDON & FORSYTH, New York, N. Y., *for appellant.*

Motion denied.

J.E.L.
I.R.K.
U.S.C.J.J.

For the reasons stated in this petition and in my dissent herein, I would grant.

L.P.M.
U.S.C.J.

Feb. 6, 1967

Order Denying Petition for Rehearing

(37)

UNITED STATES COURT OF APPEALS

THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

(and four other cases)

A petition for a rehearing having been filed herein by counsel for the appellant,

Order Denying Petition for Rehearing

(38)

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

(39)

Memorandum Opinion Denying Petition for Rehearing *in banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

CONDON & FORSYTH, New York, N. Y., *for appellant.*

All of the active judges concurring, except Judges Moore, Friendly and Hays, who vote to grant, the petition for rehearing in banc is denied.

/S/ J. EDWARD LUMBARD

6 February 1967

Order Denying Petition for Rehearing *in banc*

(40)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of February, one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

JOHN LISI, Individually and as Administrator of the Estates of LUIGINA ZOCCI LISI, deceased, and JOHN LISI, JR., deceased and as next friend and Guardian of FRANK LISI, an infant under the age of 14 years,

Plaintiff-Appellee,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

(and four other cases)

Order Denying Petition for Rehearing in banc

(41)

A petition for a rehearing containing a suggestion that the action be reheard having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEBRUARY 6, 1967
A. DANIEL FUSARO, *Clerk*

Order Granting Stay of Issuance of Mandate

(42)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOHN LISI, ETC., *et al.*,

Plaintiffs-Appellees,

—v.—

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Defendant-Appellant.

MOTION TO STAY ISSUANCE OF MANDATE

George N. Tompkins, Jr., Condon & Forsyth, New York, N. Y., for defendant-appellant.

Motion to stay issuance of mandate granted subject to provisions of Rule 28(c).

J.E.L.
L.P.M.
I.R.K.
U.S.C.J.J.

20 February 1967

Order Allowing Certiorari

SUPREME COURT OF THE UNITED STATES

No. 70, October Term, 1967

Alitalia-Linee Aeree Italiane, S.p.A.,

Petitioner,

—v.—

John Lisi, etc., *et al.*

Order Allowing Certiorari. Filed November 6, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeal for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.